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FEDERAL ENERGY  
REGULATORY COMMISSION

May 29, 2002

**BY HAND DELIVERY**

Ms. Magalie Roman Salas, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Room 1A  
Washington, D.C. 20426

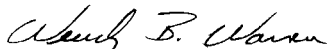
Re: *Avista Corporation, et al.* Docket No. RT01-35-005

Dear Ms. Salas:

Enclosed for filing in the referenced docket are an original and fourteen (14) copies of the Motion to Intervene and Protest of Mirant Americas, Inc. and Mirant Americas Energy Marketing, L.P.

Also enclosed are four (4) copies of the Motion to be time-stamped and returned to my messenger. Thank you for your attention to this matter.

Respectfully submitted,

  
Wendy B. Warren

cc: All Parties on Official Service List

Enclosures

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**ORIGINAL**

**IN THE  
UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

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FEDERAL ENERGY  
REGULATORY COMMISSION

**Avista Corporation, )  
Bonneville Power Administration, )  
Idaho Power Company, )  
Montana Power Company, )  
Nevada Power Company, )  
PacifiCorp, )  
Portland General Electric Company, )  
Puget Sound Energy, Inc., and )  
Sierra Pacific Power Company )**

**Docket No. RT01-35-005**

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**MOTION TO INTERVENE AND PROTEST  
OF MIRANT AMERICAS, INC. AND  
MIRANT AMERICAS ENERGY MARKETING, L.P.**

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Pursuant to Rules 211 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"), 18 C.F.R. §§ 385.211 and 385.214 (2001), and the Notice of Extension of Time issued on April 17, 2002, in the captioned docket, Mirant Americas, Inc. ("Mirant Americas") and Mirant Americas Energy Marketing, L.P. ("MAEM") (together, "Mirant") hereby move to intervene and file their protest in the captioned docket.

Mirant strongly supports a Regional Transmission Organization ("RTO") in the West to provide non-discriminatory open access transmission service and to coordinate the planning and expansion of needed transmission facilities to support the new generation capacity that is required to serve the growing load in the region. Mirant

therefore applauds the goal of the filing utilities to create an RTO in the region of sufficient size and scope to address these vital needs, and Mirant endorses many elements of the RTO design proposed by the filing utilities in the RTO West Filing.

In key areas, however, the Stage II Filing falls short of what is required. Foremost among these is the treatment of Bonneville Power Administration (“BPA”). In seeking to accommodate BPA’s unique statutory constraints, the filing utilities have unnecessarily compromised fundamental RTO and market design principles, in a way that will stifle development of, and investment in, much-needed new generating and transmission capacity.

At this stage, the Commission should also require the filing utilities to: (1) resume the RTO West development process with full stakeholder participation and place fundamental market design elements in the RTO West Open Access Transmission Tariff (“OATT”); (2) address long-term generation adequacy; (3) establish appropriate contract conversion provisions; (4) fully develop all important market design elements, such as the day-ahead and real-time energy markets and the treatment of network losses; (5) transform Firm Transmission Options (“FTOs”) into obligations, rather than options, and divorce them from scheduling; (6) work with stakeholders to develop a transmission pricing model that does not discriminate against merchant generators; (7) create a truly independent Market Monitor for the RTO West region; and (8) adopt the indemnification and limitation of liability provisions of the Commission’s *pro forma* OATT.

In support of its motion, Mirant states as follows:

**I.**

**COMMUNICATIONS AND CORRESPONDENCE**

All correspondence and communications with respect to this proceeding should be addressed to the following:

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\* Persons designated to receive service pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2001).

**II.**

**NATURE OF THE PROCEEDING**

On March 29, 2002, as supplemented by an *errata* filing on April 22, 2002, Avista Corporation, Bonneville Power Administration, Idaho Power Company, NorthWestern Energy, L.L.C. (formerly the Montana Power Company), Nevada Power Company, PacifiCorp, Portland General Electric Company, Puget Sound Energy, Inc. and Sierra Pacific Power Company, joined by British Columbia Hydro and Power Authority,

a non-jurisdictional Canadian utility, (collectively, the “filing utilities”), provided to the Commission in the captioned docket a Stage II Filing and Request for Declaratory Order Pursuant to Order 2000, in accordance with 18 C.F.R. §§ 35.43(c)(2) and (g) (the “Stage II Filing”).

The Stage II Filing is intended to provide all the necessary information for the Commission to issue a declaratory order concerning the filing utilities’ proposal for a regional transmission organization known as “RTO West”.

### III.

#### **INTEREST OF MIRANT**

The exact names of movants are Mirant Americas, Inc. and Mirant Americas Energy Marketing, L.P. Mirant Americas is a Delaware corporation and a wholly-owned, direct subsidiary of Mirant Corporation. MAEM is a limited partnership formed under the laws of Delaware and is an indirect subsidiary of Mirant Corporation.

Mirant Americas, as the owner of approximately 3,000 MW of generation in the Western United States, and the developer of approximately 1,000 MW of new generating capacity under construction in the region, and MAEM, as a leading power marketer active in the region, are directly affected by the filing utilities’ market design efforts. Mirant affiliates will be interconnected with the transmission system of RTO West and will transact in RTO West’s markets and therefore have a substantial interest in the outcome of this proceeding. Mirant’s interest cannot be adequately represented by any other participant and its participation is in the public interest.

#### IV.

#### PROTEST

##### **A. The Commission Must Balance BPA's Statutory Constraints With RTO And Market Design Principles.**

All of the RTO West filings to date, including the Stage II Filing and the RTO West filing utilities' comments in the Electricity Market Design and Structure proceedings, underscore that the most significant issue in the formation of RTO West is reconciling RTO principles with BPA's unique situation. The Commission has jurisdiction over BPA only as a "transmitting utility" under the Federal Power Act ("FPA"), as amended by the Energy Policy Act of 1992, and such jurisdiction is limited. BPA itself is constrained by several federal statutes, including the Pacific Northwest Electric Power Planning and Conservation Act, the Federal Columbia River Transmission System Act of 1974 and the Bonneville Project Act of 1937. In light of this, the filing utilities have repeatedly emphasized that the Commission must provide RTO West with flexibility to accommodate BPA's statutory constraints. *See, e.g.,* Stage II Filing, Transmittal Letter at 12, n.8; *RTO West Filing Utilities' October 23, 2000 Filing Letter to FERC Concerning RTO West Proposal (Stage I)*, Docket No. RTO1-35, 50-55 (filed Oct. 23, 2000)(the "Stage I Filing").

Mirant recognizes that without the direct participation of BPA, with its vast transmission system, RTO West will not be viable. Mirant, therefore, supports such flexibility as will enable BPA to participate in RTO West. That flexibility, however, must still respect the bedrock principles of RTO formation and standard market design,

such as non-discriminatory open access to the transmission grid for all market participants. In that regard, the filing utilities have gone too far in proposing to reserve transmission capacity for future load growth associated with existing transmission contracts, in addition to the specified commitments represented by the existing transmission contracts. See Stage II Filing, Attachment E1, *RTO West Pricing Proposal*, 13 and n.13; Stage II Filing, Attachment F, *RTO West Congestion Management Proposal*, 23. While BPA is required to satisfy its own needs before offering access to other utilities and to furnish transmission only as long as it does not interfere with its service to Northwest loads and its power marketing program, BPA is also required to provide equal access to the capacity of its transmission system that is in excess of that required to move federal power. See 16 U.S.C. § 838d. In determining whether there is excess capacity, BPA may consider reasonably foreseeable federal needs. See *California Energy Commission v. Bonneville Power Administration*, 909 F.2d 1298, 1312 (9th Cir. 1990), cert. denied 111 S.Ct. 1682 (1991). This does not mean, however, that there must be an outright reservation of capacity, from the inception of RTO West, for load growth associated with existing transmission contracts.

To the contrary, BPA's existing unused capacity should be made available to third parties, with the *proviso* that BPA may have to "bump" some open access transmission customers if its preference power transactions need the capacity. While Mirant understands that BPA might not be able to offer new customers transmission service agreements beyond the time at which BPA reasonably expects to need capacity for preference power transactions, even these limitations may be unnecessary, given

BPA's ability to run "like a business" and make business strategy decisions about the use of its assets. See *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1171 (9th Cir. 1997) (upholding BPA's decision, under its "unusually expansive mandate to operate with a business-oriented philosophy," to transmit non-federal power to direct service industrial customers). In short, rather than reserving transmission capacity for load growth from the beginning, and turning away non-public customers completely, BPA should make unused capacity available for the term it foresees the capacity being excess to its need to move federal power and with the understanding that the capacity may have to be recalled.

BPA's statutory obligations can thus be made more compatible with RTO design principles, for the benefit of both RTO West and BPA. BPA needs to participate in RTO West to enjoy the benefits of the additional generation and transmission capacity that will be made available to satisfy the load growth occurring in the RTO West region. Indeed, BPA's own retail load obligation is growing and BPA is "increasingly unable to meet" that obligation. See Jim Harding, *Bonneville and West Coast Electric Markets*, *The Electricity Journal*, Mar. 2002, at 53. A properly structured RTO that does not discriminate against owners of new generation capacity, such as merchant generators, and provides true open access to the transmission grid, as well as equal opportunities to invest in grid expansion, is critical to the development of the generation and transmission capacity needed to serve load growth in the West. The prevailing assumption seems to be that only BPA will develop additional transmission capacity in the future. Mirant



submits that if RTO West is properly structured and opportunities are created for others to invest in transmission, such investment will occur.

**B. The Commission Must Order The Filing Utilities to Resume The RTO West Development Process with Full Stakeholder Involvement.**

1. Inclusion of Stakeholders

Mirant requests that the Commission order the seating of the RTO West Board of Trustees (the “Board”) as promptly as possible to provide a mechanism for non-filing utilities to voice their interests. This will allow the RTO West development process to continue in an efficient and meaningful manner. In Order No. 2000, the Commission established a collaborative process for utilities to facilitate the creation of regional transmission organizations. *See Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809, 812 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh’g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 30,092 (2000), *review pending sub nom.*, *Public Utility District. No. 1 of Snohomish County, Washington v. FERC*, Nos. 00-1171, *et al.* (D.C. Cir). The earlier Stage I RTO West filing process properly included stakeholders and interested parties from the northwest and western United States, and from British Columbia and Alberta, Canada. *See* Stage I Filing at 4-5. The Stage II filing, however, abandoned the collaborative stakeholder process in the drafting of the RTO West Pricing Proposal for the recovery of the fixed costs of the transmission system. *See* Stage II Filing, Transmittal Letter at 17-18. Not surprisingly, the filing utilities’ decision to terminate the

public meeting process resulted in a proposal significantly different from the one RTO West was working towards when the stakeholders were included.

The need to restore stakeholder participation in the development process makes it essential that the Commission require the immediate selection of the Board. Such action would be consistent with the Commission's Phase I order urging prompt implementation of the RTO West governing structure and the selection of the Board. *See Avista Corp., et al.*, 95 FERC ¶ 61,114, at 61,325 (2001).

The seating of the Board is critical to bringing stakeholders and interested parties into the RTO development process. The RTO West bylaws provide for the establishment of a Board Advisory Committee (the "BAC") to give advice to the Board, promote input on Board decisions and to provide a focal point for the dissemination of information. *See Stage II Filing, Attachment C, Bylaws of RTO West*, 38. In fulfilling its duties to the Board, the BAC may consider issues offered from any source, including the stakeholders and other interested parties. The establishment of the BAC will offer stakeholders an opportunity to bring to the Board's attention any issues of importance or dissenting views. Until the Board is seated, the stakeholders and interested parties other than the filing utilities will not have an established, institutional mechanism through which to participate in the RTO development process, and pending that participation, RTO West's design will continue largely to reflect only the interests of the filing utilities.

The establishment of the Board will also permit progress to be made on issues critical to the development process. Under the bylaws of RTO West, until the full Board has been elected and taken office, the Interim Board of Directors (the "Interim

Board”) is authorized to hire and contract with interim personnel to perform activities that are appropriate to prepare RTO West to assume operational control of the transmission facilities in the RTO West region. See Stage II Filing, Attachment C at 51. Unfortunately, the Interim Board does not have the authority to take action with respect to transmission contract conversion, transmission planning and the expansion and development of an OATT. In order to resolve these critical market design issues, the Board must be seated.

## 2. The RTO West Transmission Operating Agreement

Once seated, the Board’s top priority should be the establishment of an OATT. The Stage II filing does not include an OATT because the filing utilities are awaiting the results of the Commission’s efforts on a new *pro forma* OATT for jurisdictional utilities and regional transmission organizations. The Stage II filing does include the RTO West Transmission Operating Agreement (the “TOA”), within which the filing utilities have included many critical elements of the standard market design (e.g., a congestion management proposal, the RTO West pricing model and the ancillary services approach).

Mirant strongly disagrees with the inclusion of such central market design provisions in the TOA. By incorporating such provisions in the TOA, the transmission owners are including vital elements of the market design in an agreement that only they, together with the Board, can amend. The TOA may not be modified except by subsequent mutual written agreement, duly executed by the Parties. See Stage II Filing, Attachment A, *RTO West Transmission Operation Agreement*, 128. This effectively

gives the transmission owners veto power over the Board on decisions to amend the TOA and file it with the Commission pursuant to Section 205 of the FPA. Mirant submits that the Board should have unfettered Section 205 filing rights. This procedural mechanism also makes it extremely difficult for the stakeholders to play a significant role in developing market design elements that directly impact their interests. The filing utilities have acknowledged that aspects of the RTO West proposal that differ from the Commission's vision for a single market design must be included in the RTO West Tariff, which will be worked on through a collaborative public process. *See Stage II Filing, Transmittal Letter at 12.* The same is true of the fundamentals of market design – these should be included in the OATT, not the TOA, or non-filing utilities will have no meaningful opportunity to shape significant components of RTO West's market design.

**C. The Filing Utilities Should Address Long-Term Generation Adequacy.**

Nowhere in the Stage II Filing do the filing utilities address long-term generation adequacy. The filing utilities acknowledge as much in their comments on the Commission's options paper issued in the Electricity Market Design and Structure proceedings, in Docket No. RM01-12-000, on April 10, 2002 (the "Options Paper"), stating their belief that states and existing regional entities should administer generation adequacy measures. *See Comments of The RTO West Filing Utilities on Options for Resolving Rate and Transition Issues in Standardized Transmission Service and Wholesale Electric Market Design*, Docket No. RM01-12-000, 13-14 (filed May 1, 2002).

Mirant submits that in an unsettled regulatory environment, particularly one lacking demand response mechanisms, capacity obligations and markets are required to send the price signals and provide the necessary incentives for construction of new generation facilities. The RTO West region clearly needs additional generation capacity and promoting its development should be a paramount objective of RTO West. So while it is true that input from state and regional authorities will play a role in efforts to develop regional capacity requirements, *see Comments of Mirant Americas, Inc. and Mirant Americas Energy Marketing, L.P.*, Docket No. RM01-12-000, 7 (filed May 1, 2002) (hereinafter, “Mirant’s Options Paper Comments”), this does not justify the filing utilities’ refusal to proceed with the planning and design work of capacity markets in RTO West.

**D. The Filing Utilities Must Establish Appropriate Contract Conversion Provisions.**

As proposed, RTO West’s provisions regarding transmission contract conversion will result in a bifurcated market that discriminates against merchant generators. The filing utilities propose that RTO West would operate the transmission system differently for customers with existing transmission contracts than for firm transmission customers. *See* Stage II Filing, Attachment E1 at 2. The existing rights holders would be served by the participating transmission owners (“PTOs”), who will have the first opportunity to resolve congestion, through redispatch.<sup>1</sup> But new firm transmission customers will be subject to the RTO West congestion management

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<sup>1</sup> *See* Stage II Filing, Attachment F at 9, 17-22. Mirant notes that the details of the PTOs’ congestion management regime have not been shared with other stakeholders.

protocols. *See* Stage II Filing, Attachment F at 1. The fact that the congestion management process available only to existing rights holders takes place before the general RTO West congestion management process unduly discriminates against new customers, such as merchant generators.<sup>2</sup>

Moreover, if transmission capacity is reserved to serve all existing transmission contracts, there will be little capacity remaining with which to provide open access transmission service to new customers, such as merchant generators. Declaring the RTO West grid “open access” without making capacity available for open access service would be a meaningless gesture. As discussed above, the Commission may not be able to require conversion of the majority of BPA’s existing transmission contracts, particularly not its contracts with public utility districts and direct service industrial customers. But the Commission can and should encourage those RTO West filing utilities subject to its jurisdiction to institute a contract conversion process for their existing transmission contracts, including their contracts with BPA and their contracts with each other and other wholesale customers. As suggested in Mirant’s Comments on the Commission’s Options Paper, the most efficient and fair way to convert these contracts would be to convert existing customers’ usage to initial Transmission Rights, then auction those Transmission Rights and allocate the revenues from the auction back to the holders of the initial Transmission Rights (*i.e.*, the existing customers). *See Mirant’s Options Paper Comments* at 6-7. This would ensure that the Transmission

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<sup>2</sup> Without knowing the details of the PTOs’ congestion management scheme, such details not having been supplied to stakeholders, it is difficult to tell whether the scheme contains other discriminatory aspects.

Rights are obtained by the entities that value them most highly, while holding the existing customers harmless. *See id.*

Finally, at a bare minimum, the Commission must prohibit the RTO West filing utilities from reserving transmission capacity for unspecified and amorphous projected load growth, contrary to Order No. 888 and the principles set forth in the Commission's "Working Paper on Standardized Transmission Service and Wholesale Electric Market Design" issued in Docket No. RM01-12-00 (the "Working Paper"). *See* Order No. 888, FERC Stats. & Regs. [Regs. Preambles, 1991-1996] ¶ 31,036, at 31,694 (1996); *Working Paper on Standardized Transmission Service and Wholesale Electric Market Design*, Docket No. RM01-12-00, 7 (issued Mar. 15, 2002). As discussed above, BPA's statutes do not require such a broad reservation and the Commission's precedent precludes it for those filing utilities subject to the Commission's jurisdiction.

**E. Many Elements of The RTO West Market Design And Pricing Require Further Development.**

The Stage II filing is, in many ways, incomplete or provisional in nature. Several crucial markets or market mechanisms have not been fully developed, and it appears that the filing utilities envision energy markets as serving only congestion management purposes, not as robust and important markets in their own right. Other market mechanisms, such as Financial Transmission Options ("FTOs") should be reconsidered and modified.

1. Day Ahead and Real Time Energy Markets

As proposed, RTO West would include no day-ahead energy market. The day-ahead market the filing utilities have proposed would serve only congestion management purposes, as is suggested by the balanced schedule requirement and a separate incremental and decremental market. See Stage II Filing, Attachment F at 9. Lack of a day-ahead energy market is inconsistent with the Commission's Working Paper – a departure the filing utilities have not explained. See *Working Paper* at 13. In addition, the balanced schedule requirement itself is contrary to the principles set forth in the Working Paper. See *Working Paper* at 14. ("Individual market participants must not be required to submit balanced schedules").

Furthermore, the real-time energy market the filing utilities have proposed does not appear to be a fully functioning market. Rather, it appears that the real-time market will play a very limited role, perhaps serving only to make up for minor scheduling deviations. As discussed in the Stage II Filing's Congestion Management Proposal, the requirement that all scheduling coordinators submit balanced schedules is expected to "relieve pressure" on the real-time market and penalties will be imposed for "improper reliance" on imbalance energy from the real-time market. See Stage II Filing, Attachment F at 9. These goals suggest that the filing utilities do not want the real-time energy market to be a true, robust market, but instead see it as a minor adjunct to their congestion management mechanism. This, too, is contrary to the market design proposed by the Commission in the *Working Paper*, which requires a real-time market in which



market participants are able to revise their schedules for bilateral transactions and self-supply after the close of the day-ahead market. *See Working Paper* at 17.

2. Transmission Losses

The filing utilities have not resolved how to treat transmission losses. *See* Stage II Filing, Attachment E1 at 23. Given the immense geographical scope of RTO West, losses could conceivably be more significant than congestion costs. Certainly they merit attention earlier rather than later in the development process. Mirant suggests that RTO West allocate the costs of losses through a marginal, or incremental, losses methodology, but implemented in such a way as to avoid the problems with such a methodology that have been noted, for example, with the New York Independent System Operator's marginal losses allocation methodology. *See Sithe/Independence Power Partners, L.P. v. FERC*, 285 F.3d 1 (D.C. Cir. 2002); *see also Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944 (D.C. Cir. 1999).

3. Financial Transmission Options

a) FTOs should be obligations, not options.

The concept of FTOs as options, as proposed by the filing utilities, should be fundamentally altered. FTOs should instead be obligations. Structuring FTOs as options will reduce the number of financial transmission rights made available to the market in the initial RTO West auction, thereby reducing market participants' ability to hedge. As an obligation, an FTO requires the transmission provider to pay the holder of the FTO when congestion occurs in the expected direction, but requires the FTO holder to pay the transmission provider when congestion occurs in the opposite direction. In

contrast, when FTOs are options and congestion occurs in the opposite direction from that anticipated, the transmission provider has to pay to resolve congestion (*i.e.*, for counterflows) without receiving reimbursement from the FTO holder. Because of the risk that it will not be paid to resolve congestion in certain circumstances where FTOs are options, the transmission provider cannot safely auction off or allocate as many options as it can obligations, thus reducing the transfer capability it can financially allocate. In that circumstance, the physical capacity of the network does not change, but the ability of participants to hedge against congestion is reduced. For these reasons, RTO West should alter its proposal to require FTOs as obligations at the outset.

b) FTOs should be pure financial instruments.

As proposed, FTOs would have a “use it or lose it” restriction. In other words, the FTOs the filing utilities propose only have value when matched against an actual physical transaction. *See* Stage II Filing, Attachment F at 3. This has been likened to a tax credit. *See*, Bruce W. Radford, *Toward a Standard Market Design for RTOs*, Public Utilities Fortnightly, Apr. 15, 2002, at 43. Just as a tax credit has no value unless you owe taxes against which to apply the tax credit, the FTOs the filing utilities propose have no value unless the holder has an actual physical transaction with congestion charges against which to credit the FTO.

The linkage to physical transactions created by the “use it or lose it” restriction will preclude participation in the FTO markets by financial intermediaries, such as banks and trading houses, which will adversely affect the liquidity of the secondary markets for FTOs. Thus, although as proposed the RTO West FTOs are not

technically physical instruments, by tying their value to physical movement of power, the filing utilities have burdened their FTOs with some of the same limitations as a purely physical right.

**F. The Proposed Transmission Pricing Model Is Discriminatory.**

Perhaps the single biggest flaw in the filing utilities' transmission pricing model is that the filing utilities developed it with no input from stakeholders. As discussed above, the Commission should direct the RTO West filing utilities to seat the Board immediately, so that the Board can again convene stakeholder meetings at which critical issues such as transmission pricing can be addressed.

Without input from stakeholders, the filing utilities have come up with a transmission pricing model that is unworkable and unduly discriminatory. First, it appears, given that the export access fee is based on schedules rather than actual power flows, that customers would incur an export access fee whether or not access to the external interfaces (interface points between the RTO West control area and transmission systems wholly external to the RTO West control area) is available. *See* Stage II Filing, Attachment E1 at 8. Second, the proposed export access fee appears to discriminate against new transmission customers, such as merchant generators, by subjecting them to different charges than those to which the incumbent utilities are subject. *See* Stage II Filing, Attachment E1 at 14. Under the filing utilities' Pricing Proposal, a customer taking transmission service from RTO West may obtain External Access, or the ability to schedule power to external interfaces, only by paying the External Access Interface Fee. *See id.* Meanwhile, incumbents, which have existing transmission contracts that provide

access to the external interfaces, can obtain External Access by paying a “Transfer Charge.” *See id.* Like the congestion management proposal discussed above, this aspect of the transmission pricing model would create a bifurcated system in which existing transmission contract holders will have a higher class of service than new customers, such as merchant generators.

Finally, Mirant submits that RTO West’s proposed export access fees are unnecessary, because access charges should not apply to exports and wheel throughs. As discussed in Mirant’s comments on the Commission’s Options Paper, eliminating access charges for exports and wheel throughs would significantly reduce pancaking of access charges and promote a national energy market with regional delivery capability. *See Mirant’s Options Paper Comments* at 4. And, as explained in Mirant’s comments on the Options Paper, if implemented uniformly, this policy would not result in improper shifting of costs to load. *See id.*

#### **G. RTO West Needs A Truly Independent Market Monitor.**

##### **1. Independence of The Market Monitor**

The filing utilities propose a single market monitoring entity to provide independent, impartial and effective monitoring of the RTO West Market and its participants. In order to satisfy its market monitoring function, the Market Monitor (the “MM”) must be truly independent, fiscally, operationally and administratively, from RTO West. The MM should not be a “unit” or subdivision of RTO West, but a separate, stand-alone entity. As proposed, however, the MM would be a part of the RTO West organization. The Board would be responsible for appointing, supervising, evaluating

and disciplining the market monitoring director, and the MM would work with the RTO West staff to address matters such as design flaws and inconsistent market performance.

Given the importance of the MM, structural and procedural protections must be in place to ensure true independence, particularly in instances in which RTO West is a Market Participant. As discussed in Mirant's comments to the Working Paper, the Commission might require that the MM have a separate budget (subject to Commission approval) that is incorporated into the RTO West OATT. *See Comments of Mirant Americas, Inc. and Mirant Americas Energy Marketing, L.P.*, Docket No. RM01-12-000, 12 (filed Apr. 10, 2002). A separate budget would be an effective means of ensuring no conflicts of interests or undue influence will interfere with the critical task of monitoring. Furthermore, all stakeholders should have an opportunity to provide input in the selection of the MM. Whatever institutional safeguards RTO West incorporates in the Marketing Monitoring Plan must be sufficient to ensure complete independence.

## 2. Monitoring of RTO West

The MM is charged with monitoring: (i) the performance of RTO West Markets; (ii) the conduct of Market Participants, transmission owners and RTO West; (iii) the operation and use of the transmission system; and (iv) the adequacy and effectiveness of market rules. *See Stage II Filing, Attachment HI, RTO West Market Monitoring Plan*, 1. According to the Stage II Filing, RTO West must ensure that monitoring the conduct of RTO West includes monitoring RTO West's compliance with its tariff, rules and governing structure. For example, in Section E.5, "Complaints Regarding Tariff Compliance", the plan provides that the RTO West tariff compliance

office shall be responsible for complaints alleging that RTO West is not complying with its Tariff. *See id* at 8. The RTO West tariff compliance office should also be charged with proactively monitoring whether or not RTO West is complying with its own tariff, not simply reacting to complaints. Monitoring RTO West's compliance with its own tariff and governing structure is an integral part of the MM's function.

3. Reporting to The Commission And The RTO West Board

The MM should simultaneously report its studies and findings to the Commission and the Board. There are several sections in the plan where RTO West must clarify that the MM reports to both entities. Section A of the plan states that the MM "may" report its studies and findings to the Commission and the Board and will coordinate with the Commission to determine the appropriate reporting of its analysis of any inconsistent market performance in an RTO Market. *See* Stage II Filing, Attachment H1 at 1. In order to ensure the independence of its investigations, the MM should be required to report the results of its investigations to the Commission. Section E.2 provides that, in some instances, the MM may report directly to the Board. *See id* at 7. Again, the MM should report its findings and results to the Board and the Commission simultaneously. This cannot be a discretionary function. Finally, under Section I, the MM has the authority to prepare periodic reports to the Board on the competitive performance and efficiency of the RTO West Markets and Services. The MM should be required to provide such reports to the Commission upon their completion.

**H. The Filing Utilities' Limitation of Liability Provisions Must Be Conformed to The *Pro Forma* OATT.**

Mirant requests that the Commission direct RTO West to conform Article XIX of the TOA and Section E of the Planning and Expansion Proposal (the "Planning Proposal") to the liability and indemnification provisions in the *pro forma* OATT. Mirant objects to RTO West's inclusion of language that is inconsistent with these provisions of the OATT. The *pro forma* tariff provisions provide certain limited protections to transmission providers. The filing utilities have failed to demonstrate that their proposed revisions are consistent with or superior to the terms in the *pro forma* tariff.

The Planning Proposal provides that a third party sponsor must assume sole responsibility for the construction or maintenance of the upgrade or facility, indemnify the PTO and RTO West against claims or liability arising from the construction or maintenance of the upgrade facility and accept cost responsibility and indemnify the PTO against claims arising from the PTO taking legal title to the upgrade or facility. *See* Stage II Filing, Attachment I, *Planning and Expansion Proposal*, 11. As drafted, these provisions deviate from the *pro forma* tariff and severely limit the rights of third parties. Accordingly, the filing utilities should conform the provisions in the Planning Proposal to correspond with those in the *pro forma* tariff and remove all non-conforming provisions. *See, e.g., Nevada Power Co.*, 97 FERC ¶ 61,227, at 62,036 (2001); *Delmarva Power & Light Co.*, 88 FERC ¶ 61,247, at 61,786 (1999).

The filing utilities have also included limitation of liability provisions in the TOA. The Commission rejected the proposed form of the Agreement Limiting Liability

in the Stage I filing of the TOA, stating that nothing in the *pro forma* tariff precluded entities from relying on state law for protection from claims founded on ordinary negligence or intentional wrongdoing. *See Avista Corp., et al.*, 95 FERC at 61,347. The Commission refused to make any determination on the merits of the liability provisions. *See id.* With the Stage II filing, the filing utilities have limited the scope of the liability provisions in the TOA so that the provisions apply only to RTO West and the transmission owner. Simply restricting the liability provisions to the relationship between RTO West and participating transmission owners, however, does not address the concern that the provisions are not consistent with the *pro forma* tariff.

## V.


### CONCLUSION

The RTO West filing utilities have undertaken an ambitious mission and, working with stakeholders, have accomplished much that is good. But now, the Commission must step in and require that the RTO West Board be seated as soon as possible, so that it may convene stakeholder meetings and press forward to fully implement an RTO that fairly balances appropriate RTO and market design imperatives with BPA's requirements.

WHEREFORE, for all of the foregoing reasons, each of Mirant Americas and MAEM moves to intervene in this proceeding with full rights as a party, and requests that the Commission direct the RTO West filing utilities to modify their proposed agreements and protocols as discussed herein.



Respectfully submitted



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Dated: May 29, 2002

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 29th day of May, 2002, I mailed, via first class mail, postage prepaid, a true and correct copy of the foregoing document to all parties on the official service list in the captioned proceeding.

  
Wendy B. Warren